110-325

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 228.

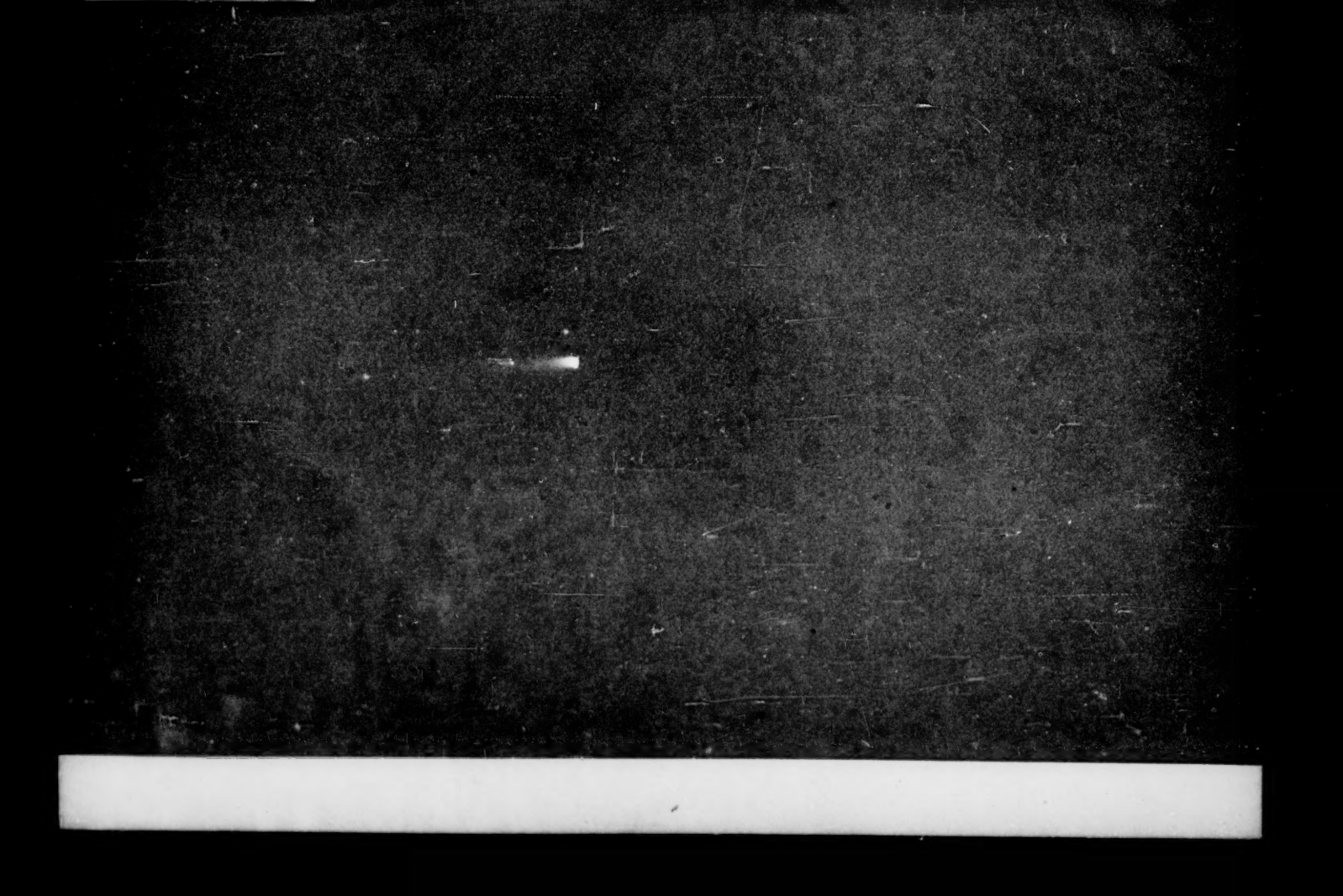
THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

WILLIAM S. ALEXANDER, JAMES H. REYNOLDS, MAHLON C. ATKINSON; AND M. D. HAMPTON AND C. S. WILSON, ADMINISTRATORS OF E. L. ALLEN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED MARCH 3, 1881.



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1 UNITED STATES OF AMERICA
vs.
WILLIAM S. ALEXANDER, JAMES H. REYNOLDS, C. S. Wilson, and M. D. Hampton, administrators of E. L. Allen, deceased, and Mahlone C. Atkinson.

To William S. Alexander, James H. Reynolds, C. S. Wilson, and M. D. Hampton, administrators of E. L. Allen, deceased, and Mahlone C. Atkinson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Middle Tennessee, wherein the United States are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said
2 writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 14th day of February, in the year of our Lord one thousand eight hundred and eighty-one.

Feb'y 14, 1881.

JNO. BAXTER,
Circuit Judge, &c.

(Indorsed:) United States vs. W. S. Alexander et al. I, J. W. Newman, as leading counsel for def'ts in error in the within citation, acknowledge due service of within notice. Feb. 14, 1881. J. W. Newman, att'y for def'ts.

3 The President of the United States of America to the judge of the circuit court of the United States for the middle district of Tennessee, in the sixth judicial circuit, greeting:

Because in the records and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court of the United States for the middle district of Tennessee before you, between the United States of America and W. S. Alexander, J. H. Reynolds, M. C. Atkinson, and E. L. Allen, a manifest error hath happened to the great damage of the United States of America as by their complaint appears;

4 And it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at Washington on the second Monday in Oct. next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected the said court may cause further to be done to correct the error which of right and according to the law and custom of the United States should be done.

5 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, on this the 15th day of Feb'y, 1881, and of the Independence of the United States the 105th year.

[SEAL.] LEWIS T. BAXTER, *Clk.*

6 MIDDLE DISTRICT OF TENNESSEE:

At a circuit court of the United States begun and held in the Federal court-room, in the city of Nashville, on the third Monday, being the 19th day of April, in the year of our Lord eighteen hundred and eighty, and of the Independence of the United States the 104th year.

Present, the Hon'l John Baxter, U. S. circuit judge for the sixth judicial circuit.

The following proceedings were had, to wit:

On the 26th day of April, 1878, a transcript from the district court of the United States for said district was filed in words and figures following:

UNITED STATES OF AMERICA,
Middle District of Tennessee:

At a district court of the United States begun and held in the Federal court-room, in the city of Nashville, within and for the district
7 aforesaid, on the 3rd Monday, being the 21st day of October, A. D. 1878, and of the Independence of the United States the 103rd year.

Present, the Hon'l Connally F. Trigg, judge.

The following proceedings were held in the case of—

THE UNITED STATES
vs. } No. 527.
ALEXANDER & REYNOLDS ET AL.

Declaration.—Filed March 1, 1877.

District court of the United States for the middle district of Tennessee, April term, 1877.

The United States of America, by A. M. Hughes, their attorney for said district, complain of Wm. S. Alexander, James H. Reynolds, Edward L. Allen, and Mahlon C. Adkinson, citizens of said district, who are in court by summons to answer the plaintiffs of a plea that they render unto the said plaintiffs the sum of $750.00 which they owe to the plaintiffs, and from them unjustly detain.

8 For that whereas heretofore, to wit, on the 3rd day of March, 1875, at the district aforesaid, the said defendants by their certain writing obligatory, sealed with their seals, and now here to the court shown; and the said Alexander and Reynolds, as principals, and the other defendants, as sureties, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the full and just sum of $750, to the payment whereof well and truly to be made they jointly and severally bound themselves, their heirs, executors, administrators, firmly by said presents.

The condition of which said writing obligatory was, that whereas the said Alexander & Reynolds had entered for deposit in their distillery ware-

house No. 192, near Fayettville, Tennessee, in the 4th collection district of Tennessee, twelve packages of distilled spirits whose serial numbers were, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, and 599. And whereas internal revenue taxes were legally imposed to the amount
9 of $367.50: Now, therefore, if the said Alexander & Reynolds pay or cause to be paid unto the collector of internal revenue for the 4th collection district of Tennessee the said amount of taxes ($367.50) due and owing on the said packages of distilled spirits before said spirits were removed from the distillery warehouse and within one year from the date of said writing obligatory, then the same should be void, otherwise to remain in full force and virtue, which said writing obligatory was delivered to the said plaintiffs and accepted by them. Yet the said Wm. S. Alexander and James H. Reynolds did not pay the said amount of taxes due and owing on said twelve packages of distilled spirits before their removal from said warehouse and within one year from the date of said writing obligatory, or cause the same to be paid, but the amount of taxes still remain due and unpaid, and thereby the said defendants became charge-
10 able in the said writing obligatory to the full amount of said taxes. Yet the said defendants though often requested to pay said sum of money above mentioned have hitherto wholly neglected and refused to pay the same or any part thereof, and still neglect and refuse, to the damage of the said plaintiffs $750; and hence suit.

A. M. HUGHES,
U. S. Dist. Att'y.

BOND.—Filed March 1, 1877.

Distillers' warehouse bond.

Know all men by these presents that we, Wm. S. Alexander and James H. Reynolds, both of Fayetteville, Tennessee, as principals, and Edward S. Allen and Mahlon C. Atkinson, both of Fayetteville, Tenn., as sureties, are held and firmly bound unto the United States of America in the full and just sum of seven hundred and fifty dollars, money of the United States, to which payment well and truly to be made we bind our-
11 selves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 3rd March, A. D. 1875.

The condition of the foregoing obligation is such that if the above-bounden principals or either of them, or either of their heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the collector of internal revenue for the 4th collection district of Tennessee the amount of taxes due and owing on the following-described distilled spirits, to wit:

Dates.	No. of b'rls.	Wine gallons.	Proof gallons.	Taxable gallons.	Serial No. of packages.
Feb'y 4	4	176	176	176	588 to 591.
25	4	172	172	172	592 to 595.
27	4	177	177	177	596 to 599.
	12	525	525	525	588 to 599.

Which were entered for deposit in the distillery warehouse of
12 Alexander & Reynolds, at Fayettville, in the 4th collection district of Tennessee, during the month ending Feb'y 28, A. D. 1875, before said spirits shall be removed from such warehouse, and within one year from the date hereof, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. S. ALEXANDER. [SEAL.]
JAMES H. REYNOLDS. [SEAL.]
EDWARD L. ALLEN. [SEAL.]
MAHLON C. ATKINSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. W. SCOTT,
T. J. BRUCE.

STATE OF TENNESSEE,
County of Lincoln, ss:

I hereby certify that on this the 3rd day of March, 1875, before me personally came Wm. S. Alexander, James H. Reynolds, Edward L. Allen, and Mahlon C. Atkinson, known to me to be the individuals described in and who executed the above bond, and severally acknowledged that they executed the same.

W. B. HICKS,
Deputy Collector.

13 (Endorsed:)

The within bond having been examined by me, the same is hereby approved, the sureties being satisfactory.

J. W. C. BRYANT, *Collector.*

MARCH 24, 1875.

Summons.—Issued March 1, 1877.

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon Wm. S. Alexander, James H. Reynolds, Edward L. Allen, and Mahlon C. Atkinson, citizens of said district, if to be found in your district, to be and appear before the judge of the district court of the United States in the sixth circuit for the middle district of Tennessee, at the Federal court-room at Nashville, in said State, on the 3rd Monday in April next, then and there to answer the
14 United States of America of a plea that they render unto the plaintiffs the sum of $750.00 which they owe to and from them detain. Herein fail not and have then and there this writ.

Witness the Hon'l Connally F. Trigg, judge of the district court ofthe United States, this the 1st day of March, A. D. 1877, and of the Independence of the United States the 101st year.

E. R. CAMPBELL, *Clerk.*

(Endorsed:)

Jo. Spence is hereby specially deputized to execute this summons and return the same as the law directs.

Dated at Nashville, Tenn., this 5th March, 1877.

E. S. WHEAT, *U. S. M.*

Came to hand day issued, and executed March 6, 1877, on E. L. Allen and M. C. Atkinson, by making known to each the contents of this summons, and at the same time delivering to each a copy of plaintiffs' declaration.

E. S. WHEAT, *U. S. M.*
By JO. SPENCE, *Dep'ty.*

Executed March 16, 1877, in the same manner as above, on J. H. Reynolds.

E. S. WHEAT, *U. S. M.*

15 Executed March 27, 1877, in same manner as above, on W. S. Alexander.

E. S. WHEAT, *U. S. M.*

Pleas.—Filed May 4, 1878.

THE UNITED STATES *vs.* ALEXANDER & REYNOLDS, EDWARD L. ALLEN & M. C. Atkinson.	No. 527. Covenant. Pleas.

District court of the United States, Nashville, middle district of Tennessee. April term, 1878.

No. 1. The defendants, by attorney come and defend the wrong and injury when, &c., and say that plaintiff should not have and maintain its action against them in manner and form as avered in the declaration, for that heretofore, to wit, on the 3rd day of March, 1875, said defendants, by their writing obligatory by them duly executed and delivered, became bound unto the plaintiff" in the penal sum of $750.00, conditioned, among other things, to forfeit and pay plaintiffs the sum of $367.50 should
16 the def'ts, Alexander and Reynolds, fail to pay the amount of revenue due plaintiffs in the making of whiskey at their distillery in the 4th district of Tennessee, No. 193, made during the month of February, 1875. And thereafter said defendants, for default in making the payment of $5,776.46, tax and revenue on 8,252 gallons of spirits, to said plaintiffs, did thereby render the plaintiffs liable under the condition of said bond to pay to plaintiff said sum of $5,776.46, part and parcel of the same so demanded of defendants in the declaration; but nevertheless the said defendants, under and by virtue of the statutes of the United States in such cases made and provided, did apply to the Secretary of the Treasury at Washington, D. C., for a release and abatement of the same so due and owing as aforesaid from defendant for an' on account of their writing obligatory and the breach and default aforesaid, when and where-
17 fore the said Secretary did by his deed release and free said defendants from their liability in the premises, copies of which were duly delivered to defendants by J. W. C. Bryant, then the collector of internal revenue for the 4th collection district of Tennessee, and the original remains with the Commissioner of Internal Revenue, and the same so duly executed was properly delivered, and is as follows:

TREASURY DEPARTMENT,
Washington, D. C., Aug. 5, 1875.

Under authority conferred by act of Congress approved May 27, 1872, I hereby abate the taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were distroyed by fire on the 6th or 7th day of March, 1875, while in the bonded warehouse of Messrs. Alexander & Reynolds, distillers in the 4th collection district of Tennessee.

(Signed) C. F. BURNAM,
Acting Secretary.

To the COMMISSIONER OF INTERNAL REVENUE.

18 By means and force of all which defendants say that plaintiff is enjoined and estopped from demanding of and from them said sum so released, part and parcel of the same demanded of them; and all of which they are ready to verify.

J. W. NEWMAN,
QUARLES & THOMA,
HOLMAN & HOLMAN,
Att'ys for Defendants.

No. 2. And for further plea in this behalf, defendants say that on the 6th day of March, 1875, the distilled spirits in the 12 packages mentioned in plaintiff's declaration, for the internal-revenue taxes on which plaintiff sues, were actually distroyed by accidental fire, without fraud, collusion, or negligence on the part of defendants Alexander & Reynolds, the owners thereof, while the same remained in the bonded warehouse of the United States attached to said distillery No. 192, in the custody of an officer of the internal revenue, and before the taxes thereon had been paid. All
19 of which defendants are ready to verify. Wherefore defendants say that they are released from the obligations of the bond sued on in this case.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

No. 3. And for further plea in this behalf, defendants say that the performance of the conditions of the bonds sued on in this case by defendants *by defendants* has become impossible by the act of God; for that after the deposit of the 12 packages of distilled spirits in said distillery warehouse No. 192, and before the tax was paid thereon, to wit, on the 6th day March, 1875, and while the same was in the custody of the United States, said distillery warehouse was struck by lightning, and by means thereof said distillery warehouse and its contents, including said 12 packages and the contents thereof, to wit, the spirits for the taxes on which this
20 suit is brought, totally consumed by fire; all of which they are ready to verify; wherefore defendants say they are released from the performance of the obligation of said bond.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

No. 4. And for further plea in this behalf, defendants C. S. Wilson and M. D. Hampton, administrators of E. L. Allen and M. C. Adkison, come and defend the wrong and injury, and for plea say they are released from the obligation of the bond sued on in this cause by virtue of the release of the Secretary of the Treasury Department of the United States set forth in hæc verba in the first plea above pleaded, because they say that on the day of August, 1875, they were duly notified by J. W. C. Bryant, the then collector of internal revenue of the 4th district of Tennessee for the United States, of the execution of said release by said Secretary,
21 and that their principals, the said Alexander & Reynolds, were then solvent, and subsequent to the date of release and before the service of the writ in this case the said Alexander & Reynolds became insolvent; all of which defendants are ready to verify: wherefore are released from all obligations to satisfy the conditions of the bond sued on in this case.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

5th. And for further plea in this behalf, defendants C. S. Wilson and M. D. Hampton come and defend the wrong and injury, and for plea say they have fully administered all and singular the assets of their intestate, E. L. Allen, which have or ought to, by due and proper course of administration, come to their hands to be administered. All of which they are ready to verify.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

6th. And for further plea in this behalf, defendants C. S. Wilson
22 and M. D. Hampton come and defend the wrong and injury, &c., and for further plea say that on of , 1877, before the clerk of the county court of Lincoln County, they suggested the insolvency of the estate of their intestate, the said E. L. Allen; and this they are ready to verify.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

7th. And for further plea in this behalf defendants say they have performed the covenants of the said bond sued on in this case and set out in plaintiff's declaration, and of this they put themselves upon the country.

J. W. NEWMAN,
HOLMAN & HOLMAN,
QUARLES & THOMA,
For Def'ts.

And the plaintiff doth the like.

J. A. WARDER,
U. S. Att'y.

Personally appeared J. W. Newman, one of the attorneys in the above cause, who makes oath in due form of law that the foregoing pleas
23 are not interposed for delay, but that justice may be done.

J. W. NEWMAN.

Subscribed and sworn to before me this May 4, 1878.

E. R. CAMPBELL, *Clerk.*

Demurrer to the foregoing pleas.

UNITED STATES
vs.
ALEXANDER & REYNOLDS ET AL.

Comes the United States of America, by their attorney, James A. Warder, and demurs to the 2nd and 3rd pleas of defendants, and assigns as causes of demurrer.

First. That there is nothing contained therein to prevent recovery.

2nd. That if said distilled spirits were destroyed by fire from and after the date of their production were at the risk of the distiller, and not of the Government.

Joinder in demurrer.

J. W. NEWMAN,
Att'y for def'ts.

3rd. And also comes the United States, and demurs to the 4th plea of the defendants, and for cause of demurrer says that there is nothing therein contained to prevent a recovery; that the plea is double.

24 4. And also comes the United States by their district attorney and defends to the 5th and 6th pleas of the defendants, and for ground of demurrer to the 5th plea says that there is nothing therein contained to prevent a recovery, because the plea fails to allege that the assets were administered without notice or knowledge on the part of the administrators that the estate was indebted to the United States.

(2) Because the plea does not set out an inventory of the assets that come to the hands of the administrator, or a schedule of disbursements.

5. And to the sixth plea, cannot be pleaded to a suit in behalf of the Government.

6. (2) That there is nothing therein contained to prevent a recovery; wherefore they pray your honor if they shall make any other and further answer thereto.

JAMES A. WARDER,
U. S. District Att'y.

7. The plaintiff', through their attorney, James A. Warder,
25 United States district attorney for Middle Tennessee, comes and craves over of the release as pleaded in the first count of the declaration.

. J. A. WARDER, *Att'y.*

Amended 4th plea.—Filed by defendants May 8, 1878.

THE UNITED STATES
vs.
ALEXANDER & REYNOLDS ET AL.

In the district court of the United States for the middle district of Tennessee.

Defendants' amended 4th plea.

The defendants C. S. Wilson and M. D. Hampton, administrators of E. L. Allen and Mahlon C. Atkinson, the said Allen & Atkinson, being the securities of Alexander & Reynolds in the bond sued on in this cause by their attorneys, come and defend the wrong and injury, &c., and for pleas says that they became heretofore, to wit, on the 3d day of March, 1875, bound and held unto the plaintiffs, as shown by bond sued on, in the penal
26 sum of $750, conditioned among other things to pay plaintiffs the sum of $367.50 should the defendants, Alexander & Reynolds, fail to pay the amount of revenue due plaintiffs in the making of spirits at their distillery, No. 293, in the 4th collection district of Tennessee, during the month of February, 1875; and thereafter said def'ts, for default in making payment of $5,776.46, tax and revenue on 8,252 gallons of spirits, to said plaintiffs, doth thereby render defendants liable under the conditions of said bond to pay plaintiffs said sum of $5,776.46, part & parcel of the same so above in the declaration demanded of defendants; but nevertheless the said defendants, Alexander & Reynolds, under and by virtue of the statutes of the United States in such case made and provided, did apply to the Secretary of the Treasury at Washington, D. C., for a release and abatement of the sum so due and owing as aforesaid from defendants for and on account of their writing obligatory and the breach and de-
27 fault aforesaid, when and wherefore the said Secretary did by his deed release and free defendants from their liability in the premises, copies of which release were duly delivered to defendants by J. W. C. Bryant, the collector of internal revenue for the 4th collection district of Tennessee, the original remaining on file in the office of Commissioner of Internal Revenue at Washington, D. C. Said release is in the words and figures following, to wit:

TREASURY DEPARTMENT,
Washington, D. C., Aug. 5, 1875.

Under authority conferred by act of Congress approved May 2, 1872, I hereby abate the taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were destroyed by fire on the 6th or 7th of March, 1875, while in the bonded warehouse of Messrs. Alexander & Reynolds, distillers, in 4th district (collection) of Tennessee.

(Signed) C. F. BURNHAM,
Acting Secretary.

28 To the COMMISSIONER OF INTERNAL REVENUE:

And said defendants say that upon the due making and delivery of said release notice thereof was given on the day of August, 1875, to the

makers of the bond aforesaid and to defendants; the securities aforesaid aver that from thence up to the giving of said release and for some time thereafter said makers were solvent and good for the amount thereof, but since the 1st day of January, 1877, said makers were and have become wholly insolvent and unable to pay their debts and to discharge the penalty for the breach aforesaid; and defendants, the sureties aforesaid, say that by reason of the release aforesaid they were prevented therefore by the act of plaintiffs, all of which they are ready to verify; wherefore they say that plaintiffs should not recover anything as against defendants, the sureties aforesaid.

29

J. W. NEWMAN,
QUARLES & THOMA,
HOLMAN & HOLMAN,
For Def'ts.

Personally appeared J. W. Newman, who makes oath in due form of law that the foregoing plea is not filed for delay, but that justice may be done.

J. W. NEWMAN.

Subscribed and sworn to before me this May 8, 1878.

E. R. CAMPBELL,
U. S. Comm'r.

Demurrer.—Filed May 8, 1878.

THE UNITED STATES
v.
ALEXANDER & REYNOLDS.

The United States of America, by their district attorney, James A Warder, demurs to the 4th plea of the defendant as amended, and assigns as causes of demurrer:

1st. That it is ane ffort on the part of the securities to establish in a case of law another and distinct cause of discharge of liability from that of the principal.

2. That the plea imputes laches to the Government, and is predi-

30 cated upon *upon* that principle of law.

3. Because the plea fails to allege and show how and in what manner the defendants were prevented from saving themselves.

Because the plea alleges that the collector of internal revenue, J. W. C. Bryant, delivered them a copy thereof, when under the laws he had no power so to do, or to bind the United States by any such act; wherefore they pray if they shall make any other and further defence thereto.

J. A. WARDER, *U. S. Att'y.*

Replication.

THE UNITED STATES OF AMERICA
v.
ALEXANDER & REYNOLDS.

Came the plaintiff by their district attorney, James A. Warder, and for

replication to the first plea of the def'ts replies and says, that the
31 Secretary of the Treasury did not by his deed remit and free said defendants from their liability, and the same was duly executed, was not properly delivered in the manner and form as the defendant in his plea hath alleged and pleaded; and this they pray may be enquired of by the country.

J. A. WARDER.

And defendant doth the like.

J. A. NEWMAN,
QUARLES & THOMAS,
HOLMAN & HOLMAN.

And for further replication they say that they are not precluded from having and maintaining their action for anything in said first plea of the defendants so alleged and pleaded, because they say that on the 13' day of October, 1875, the honl' B. H. Bristow, Secretary of the Treasury, did withdraw the order of abatement and remission as pleaded on the 5th day of August, 1875; all of which they are ready to verify.

And for further replication the plaintiffs say that they are not pre-
32 cluded from having and maintaining because of anything in the first plea of the defendant as therein alleged and pleaded. Because thay say that the honl' B. H. Bristow, Secretary of the Treasury, on the 13th day of August, 1875, did withdraw the order of abatement as pleaded, as on the 5th day of August, 1875, warrant of remission having issued to the defendant nor the order having been delivered to the defendants; all of which they are ready to verify.

JAMES A. WARDER,
U. S. Dis't Att'y.

And for further replication the plaintiffs say that they are not precluded from having and maintaining their action aforesaid for or on account of anything in the first plea of the defendants as pleaded, because they say that on the 13th day of October, 1875, the Hon. B. H. Bristow, Secretary of the Treasury, did withdraw the abatemement as pleaded on the
33 5th day of August, 1875, no credit having been given the collector on his bonded account therefor; all of which they are ready to verify.

JAMES A. WARDER,
U. S. District Attorney.

On the 21st day of April, 1877, an order was entered on the minutes, as follows:

THE UNITED STATES
v.
ALEXANDER & REYNOLDS ET AL. } No. 527 & 8 other cases.

Came the parties, by their attorneys, in the nine cases above, and the death of the defendant E. L. Allen was suggested and proven, and it appearing to the court that no one has yet administered upon the estate of E. L. Allen, these causes are continued until the next term.

On the 22nd day of December, 1877, the following order appears on the minutes:

UNITED STATES
vs.
ALEXANDER & REYNOLDS ET AL.

34 Came the parties, by their attorneys, and the death of E. L. Allen, one of the defendants, having been suggested and proven at the last term of this court, it is now considered by the court (by consent of parties) that the cause stand revived in the name of M. D. Hampton and C. S. Wilson, administrators of said E. L. Allen, deceased.

On the 6th day of May, 1878, an order was entered on the minutes, in words and figures following:

THE UNITED STATES
vs.
ALEXANDER & REYNOLDS ET AL. } 527 & 8 other cases.

Came the attorney of the United States and the defendants by their attorneys, and crave oyer of the 9 several bonds, writs, and declarations sued on in these causes, which were shown to them, and which by consent are not to be copied into the minutes of the court, and moved the court to consolidate all these causes into one before they be required
35 to plead thereto, upon the ground that the declarations themselves show upon their face that said causes are suits upon bonds of the same character and tenor and against the identical same parties, and the amounts sued for on said bonds were all due at the date of the issuance of the writs thereon, though falling due at different dates and for different amounts, which motion was by the court overruled; to which action of the court these defendants then and there excepted.

Thereupon the defendants moved the court for a rule upon the plaintiffs to set down one of said causes for hearing; the defendants assenting that the remainder of said causes await the action of said court in said cause so set down, which motion was allowed by the court.

It is ordered by the court that said cause No. 527 be set for hearing under said rule, and that defendants plead thereto; which is accordingly done.

36 On the 8th day of May, 1878, an order was entered as follows:

THE UNITED STATES
v.
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Came the attorney of the United States and the defendants by their attorneys, and after argument it is considered by the court that the demurrer of the plaintiff to the 2nd, 3rd, 4th, 5th, and 6th pleas of the defendants be sustained; to which action of the court the defendants then and there excepted, and the defendants are given leave to amend their fourth plea, and replead by Friday morning next.

On the 8th day of May, 1878, an entry was made upon the minutes as follows:

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Came again the parties by their attorneys, and upon motion of
37 defendants by their attorneys, the three last replications of the plaintiff to the pleas of the defendants was by the court ordered to be stricken from the files, and the demurrer of the plaintiffs to the fourth plea of defendants as amended was by the court sustained; to which action of the court sustaining said demurrer the defendants by their attorney then and there excepted.

And thereupon, upon application of the defendants, this cause is continued until the next term.

On the 7th day of November, 1878, judgment was rendered as follows:

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Came the attorney of the United States and the defendants in proper person, and came also a jury of good and lawful men, to wit:
38 James Davis, James Hickman, P. P. Peck, John Johns, Milton Home, B. Wright, W. J. Harmon, W. P. Hurley, W. Matt. Brown, H. L. Claiborne, John McClelland, and Charles Aultman, who being elected, tried, and sworn well and truly to try the issues joined, after hearing the evidence, the argument of counsel, and the charge of the court, upon their oaths do say that they find the issues in favor of the defendants. It is therefore considered that the defendants go hence without day.

On the 8th day of November, 1878, an order was entered as follows

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Came again the parties, by their attorneys, and the United States attorney tendered to the court his bill of exception to the rulings of the court at the trial, which was signed and sealed by the court, and ordered to be made a part of the record of the cause.

39 On the 8th day of November, 1878, a bill of exceptions was filed, which is as follows:

Bill of exceptions.

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Be it remembered that on the trial of this cause before the hon'l' Connally

F. Trigg, United States district judge, the following proceedings were had: Proof was introduced tending to show that on the 5th day of August, 1875, the Hon. C. F. Burnham, Acting Secretary of the Treasury, under the act of Congress, May 27, 1872, abated the taxes on the distilled spirits for which the warehousing bond sued on was given, and notified the Commissioner of Internal Revenue thereof, and the Commissioner notified J. W. C. Bryant to take credit therefor on his bonded account as collector of internal revenue, which he did, and when reported to the Commissioner the credit was disallowed, but in the mean time J. W. C. Bryant, collector, had notified Alexander & Reynolds, the
40 principals in the bond sued on, that the Secretary of the Treasury had abated the taxes on the distilled spirits embraced in the bond sued on, and defendants had accepted the release or order of abatement set out in the pleadings, and had sent defendants copies of said release, which they duly received.

Proof was also introduced tending to show that on the 13th day of October, 1875, the Hon. B. H. Bristow, Secretary of the Treasury, withdrew the previous order of abatement by the following statement:

TREASURY DEPARTMENT,
Washington, D. C., October 13, 1875.

SIR: In the matter of Alexander & Reynolds, for abatement of taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were destroyed by fire on the 6th or 7th of March, 1875, while in the bonded warehouse of said firm, in the 4th collection district of Tennessee, in view of the papers now on file in the case the order for abatement of said taxes, dated August 5, 1875, is hereby withdrawn until a further
41 consideration of said claim can be had.

Very respectfully,

B. H. BRISTOW, *Secretary.*

Hon. D. D. PRATT,
Commissioner of Internal Revenue.

The plaintiff requested the judge to charge the jury that it being an abatement the Secretary of the Treasury had the right at any time to revoke or suspend the same.

2. That the collector of internal revenue, J. W. C. Bryant, could not bind the Government by any notice that he might give the defendants.

3. That the abatement was inoperative and subject to be recalled at any time before warrant of remission issued from the Secretary of the Treasury or Commissioner of Internal Revenue; all of which the court declined to charge, and, among other things, not excepted to, charged the jury as follows:

That if you believe from the evidence that on the 5th day of August, 1875, the Secretary of the Treasury abated said taxes, and
42 notified the Commissioner of Internal Revenue thereof, and he notified the collector, and he notified the defendants, the action of the acting Secretary of the Treasury so taken was final, and any attempted suspension, withdrawal, or thereof would be invalid, and it would be your duty to find for the defendants; to all of which the plaintiff excepted at the time.

The jury returned a verdict for the defendants. The plaintiffs moved for a new trial, which motion was overruled, and the plaintiffs tender to the court this their bill of exceptions, and ask that it be signed and sealed and made a part of the record of the cause, which is accordingly done.

CONNALLY F. TRIGG, [SEAL.]
Judge, &c.

Certificate.

UNITED STATES OF AMERICA,
Middle District of Tennessee:

I, Edward R. Campbell, clerk of the district court of the United States for the middle district of Tennessee, do hereby certify that the fore-
43 going is a true and perfect copy of the records and proceedings had in said court in the cause of the United States vs. Alexander & Reynolds et al. as the same appears of record and from the original files still remaining in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Nashville, on the 21st day of April, 1879.

E. R. CAMPBELL, *Clerk.*

On the 8th day of November, 1878, a writ error was filed as follows:

The President of the United States of America to the judge of the district court of the United States for the middle district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said district court of the United States for the middle district of Tennessee, before you, between the United States of America and W. S. Alexander, J. H. Reynolds, M. C. Atkinson, and E. L. Allen, a manifest error hath happened to the great damage
44 of the United States of America, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded that if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the middle district of Tennessee, together with this writ, so that you have the same at Nashville, in said district, on the 3rd Monday in April next, in the said circuit court to be then and tried, that the records and proceedings aforesaid being inspected, the said circuit court may cause further to be done to correct the error, which of right and according to the law and custom of the United States should be done.

Witness the hon'l. Morrison R. Waite, Chief Justice of the Su-
45 preme Court of the *of the* United States, on the 8th day of November, A. D. 1878, and of the Independence of the United States the 103rd year.

LEWIS T. BAXTER, *Clerk.*

On the 28th April, 1880, judgment was rendered by said circuit court of the United States in words and figures following:

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This cause came on this day finally to be heard and determined before the hon'l. John Baxter, judge, &c., upon the transcript of the record from the district court of the United States for the middle district of Tennessee, and the court being of the opinion that there is no error is pleased to order that the plaintiffs' appeal be dismissed.

To which action of the court the district attorney excepted then and there.

46 MIDDLE DISTRICT OF TENNESSEE:

I, Lewis T. Baxter, clerk of the circuit court of the United States in and for the district aforesaid, do hereby certify that the foregoing is a full, true, and perfect transcript of the records and proceedings had in the case lately determined in said court, wherein the United States were plaintiffs and Alexander & Reynolds et al. were defendants, as the same appears of record and on file in my office.

Witness my hand and the seal of said court at office, at Nashville, this 28th day of December, A. D. 1880.

[SEAL.] LEWIS T. BAXTER, *Clk.*

(Indorsement on cover:) No. 228. The United States, plaintiff" in error, vs. W. S. Alexander, J. H. Reynolds, M. C. Atkinson, and E. L. Allen. M. Tennessee, C. C. U. S. Filed 3rd March, 1881.

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In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
WILLIAM S. ALEXANDER AND OTHERS. } No. 228.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
WILLIAM S. ALEXANDER AND OTHERS. } No. 228.

BRIEF FOR THE UNITED STATES.

This is an action on the warehouse bond of Alexander & Reynolds, distillers.

The breach laid in the declaration is that the said distillers had not paid the taxes due on the several packages of distilled spirits mentioned in the condition of the bond and entered for deposit in the warehouse.

The defendants pleaded seven pleas, to all of which, saving the first and seventh, the plaintiff demurred (R., pp. 5, 9), and there was judgment for the plaintiff on all the demurrers (R., pp. 12, 13.) As this judgment stands unchallenged by writ of error no question can be raised here as to the matter of said pleas or any of them.

Issue was joined under the first and seventh pleas.

The first plea sets up that the taxes sued for were abated by the Secretary of the Treasury, pursuant to law.

The second plea is *performavit omnia* (R., p. 7).

On the 7th November, 1878, the case was tried in the district court, and a verdict rendered for the defendants, on which there was judgment accordingly (R., p. 13).

There are eight other cases depending on the result of this case (R., p. 14), and the whole amount of taxes involved in all the cases is $5,776.46.

On the trial evidence was introduced tending to show that on 5th August, 1875, the Hon. C. F. Burnham, Acting Secretary of the Treasury, had abated the taxes sued for and notified the Commissioner of Internal Revenue thereof; that the Commissioner had notified the collector to take credit therefor on his bonded account; that the collector had done so, and had notified the distillers of the abatement, and that defendants had accepted said release.

The following documentary evidence, tending to show that the said order of abatement had been rescinded, was introduced, that is to say:

TREASURY DEPARTMENT,
Washington, D. C., October 13, 1875.

SIR: In the matter of Alexander & Reynolds, for abatement of taxes accruing on 8,252 gallons of spirits, amounting to $5,776.46, which were destroyed by fire on the 6th or 7th of March, 1875, while in the bonded warehouse of said firm, in the 4th collection district of Tennessee, in view of the papers now on file in the case, the order for abatement of said taxes, dated August 5, 1875, is hereby withdrawn until a further consideration of said claim can be had.

Very respectfully,
B. H. BRISTOW,
Secretary.

Hon. D. D. PRATT,
Commissioner of Internal Revenue.

Upon this state of evidence the plaintiff asked the court to instruct the jury that the Secretary of the Treasury had the right to revoke or suspend the order of abatement; that the Commissioner of Internal Revenue had no authority to bind the Government by any notice he might give, and that the abatement was inoperative and subject to be recalled at any time before a warrant of remission issued.

The court refused to give these instructions, but instructed the jury that if they believed the evidence above presented the action of the Secretary of the Treasury in abating said taxes was final, and they must find for the defendants, to all which the plaintiff then and there excepted. (R., pp. 13, 14.)

A writ of error was sued forth from the circuit court, but that court affirmed the judgment. (R., p. 16.)

ASSIGNMENT OF ERROR.

It was error to instruct the jury that the order of the Secretary abating the taxes was not revocable.

ARGUMENT.

It is not denied that the principle of *res adjudicata* applies, in some instances, to the results of executive action. But in every case of the kind the action must have been touching some *matter of law*.

But in the case at bar the order was evidently suspended upon new evidence brought to the attention of the Secretary. It has never been held that an executive order may not be reviewed upon a new presentation of facts. It is quite right that the decisions of the proper officers of